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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION,
Cross-Petitioners,

v.

THE STATE OF WYOMING, et al.,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED

1. Whether, under the Second Treaty of Fort Bridger, pursuant to which the Wind River Indian Reservation was established, the amount of water reserved for the Indians is to be quantified solely by reference to the irrigation needs of the Reservation or rather, in light of the Treaty's express purpose of creating a "permanent home" for the Indians, by reference to all uses necessary to develop a permanent homeland for the Indians on the Reservation.

2. Whether, under the Treaty, the water rights of the Tribes relate only to surface-water sources or rather to both surface-water and groundwater sources.

3. Whether, under the Treaty, the Tribes are restricted from exporting their reserved water off the Reservation for use by themselves or by others or rather, consistently with the rights enjoyed by all other water users in Wyoming, they may export their reserved water off the Reservation.

4. Whether, under 25 U.S.C. § 194, which governs the burden of proof in disputes regarding Indian property, the Wyoming courts erred in assigning the Tribes, after a *prima facie* case had been made, the burden of proof in establishing their reserved water rights for the irrigation needs of currently and previously irrigated Reservation lands without state water certificates and of two proposed irrigation projects.

5. Whether the Wyoming courts erred in computing the amount of water reserved for the irrigation needs of currently and previously irrigated Reservation lands by using a water-use efficiency rate substantially higher than the average efficiency rate currently achieved by all irrigators in the region.

6. What priority date should be accorded to practicably irrigable Reservation lands owned by non-Indians who have claimed a reserved right?

LIST OF PARTIES

The parties to the proceedings below were the cross-petitioners, the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation, and the cross-respondents, the State of Wyoming, the United States of America, Mary O. Ahlborn, Eva M. Barnett, Owen Barnett, Bradford Bath, Donald Bath, Black Butte Livestock Company, Campbells, Inc., City of Riverton, Wyoming, Kenneth Ward Crandall, Phyllis L. Crandall, DHB & Co., Barbara J. Daniels, Billie M. Daniels, Deaver Irrigation District, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Grace Graboski, Griffin Brothers, Incorporated, Olga J. Harvey, Robert W. Harvey, Albert Hornecker, Hornecker Livestock Co., Inc., Bertha Jones, Brenda Joyce Kellogg, Gary V. Kellogg, Irene M. Long, Russell E. Long, Elsie Martin, Richard Martin, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, Midvale Irrigation District, Carolyn R. Nelson, Vern Nelson, Norwest Bank of Omaha, N.A., Norris Edwin Odee, F. Louise Odee, William Okie, Kenneth Outland, Iona Outland, Owl Creek Irrigation District members, PLB & Co., Sylvia Paulsen, Red Creek Cattle Company, Red Lane Watershed Improvement District, Jerry D. Redding, Sheila C. Redding, Charles Richardson, Riverton Valley Irrigation District, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Daisy E. Sessions, Newell S. Sessions, Barbara Smith, Robert Stewart, Town of East Thermopolis, Wyoming, Ralph Floyd Urbigkit, V E Bar Livestock Company, Barbara Webber, Landis Webber, Delores J. Weese, Raymond

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

The cross-petitioners, the Shoshone and Northern Arapaho Indian Tribes, respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Wyoming entered on February 24, 1988, on the questions presented herein if this Court grants the petition in *Wyoming v. United States*, No. 88-309.

OPINIONS BELOW

The opinions below are reproduced in the appendix to the petition of the State of Wyoming in No. 88-309, as described in the State's petition at page 1.

JURISDICTION

The decision of the Supreme Court of Wyoming was rendered on February 24, 1988, and timely motions for rehearing were denied by that court on April 22, 1988. On July 7, 1988, the State of Wyoming obtained an extension of time to file its petition for a writ of certiorari through August 20, 1988. Cross-petitioners received the State's timely-filed petition on August 22, 1988. This cross-petition is filed pursuant to Rule 19.5, and jurisdiction is proper under 28 U.S.C. § 1257(3).

TREATY INVOLVED

The provisions of the Second Treaty of Fort Bridger, 15 Stat. 673 (1868), are set forth in the appendix to the petition ("Pet. App.") of the State of Wyoming in No. 88-309. Pet. App. at 793a-803a.

STATEMENT OF THE CASE

This cross-petition concerns the reserved water rights of the Shoshone and Northern Arapaho Tribes under the

Second Treaty of Fort Bridger, 15 Stat. 673, pursuant to which the United States set apart the Wind River Indian Reservation as the permanent homeland originally for the Shoshone Tribe and, later, for both the Shoshone and Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1863, five years before the Wind River Indian Reservation was established, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). Pet. App. at 9a. That treaty declared "a firm and perpetual peace . . . between the Shoshonee nation and the United States" and recognized as "Shoshonee country" a tract of 44,672,000 acres of land located in what are now the states of Wyoming, Colorado and Utah. First Treaty of Fort Bridger, arts. 1, 4; Pet. App. at 9a.

In 1868, as westward expansion increased following the end of the Civil War, the United States and the Shoshone Tribe—then "consisting of full blood blanket Indians, unable to read, write or speak English," *United States v. Shoshone Tribe*, 304 U.S. 111, 114 (1938)—entered into the Second Treaty of Fort Bridger (the "Treaty"). 15 Stat. 673; Pet. App. at 793a. Under the terms of the Treaty, the Shoshone Tribe agreed to "relinquish all title, claims, or rights" to the vast tract of land previously recognized as "Shoshonee country" under the First Treaty of Fort Bridger. Second Treaty of Fort Bridger, art. 2. In return, the United States agreed to "set apart" a much smaller tract of land—now known as the Wind River Indian Reservation (the "Reservation")—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians."[1] *Id.* Under

[1] Under the Treaty, the United States set apart a tract of 3,054,182 acres for the Shoshone Tribe, United States v. Shoshone Tribe, 304

the terms of the Treaty, the Tribe agreed to make the Reservation its "permanent home." *Id.* at art. 4.

The Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), had been permitted to select the lands comprising the Reservation. Pet. at 4. The tract of land selected by the Shoshones was then "known to contain valuable mineral deposits—gold, oil, coal and gypsum [and to include] more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. 111, 114 (1938). Moreover, the tract selected by the Shoshones "was well protected by mountain ranges and a divide, and was the choicest and best-watered portion of Wyoming." *Id.* These lands were reserved by the Treaty for the permanent homeland of the Shoshones before the United States had created the Territory of Wyoming, and more than twenty-one years before Wyoming was admitted to the Union in 1890.

Although originally set apart for only the Shoshone Tribe, the Reservation has since become the permanent homeland of both the Shoshone and Northern Arapaho Tribes. The two Tribes have jointly occupied the Reservation since 1878. Pet. App. at 9a-10a.

Procedural History of the Adjudication

This adjudication began more than a decade ago when the State of Wyoming sued the United States for a declaration of federal and Indian water rights in the Big Horn River Drainage Basin (the "Big Horn Basin"), in which

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U.S. 111, 113 (1938), of which approximately two-thirds currently remain part of the Wind River Indian Reservation. Under the Treaty, the United States also agreed to set apart a reservation, later known as the Fort Hall Reservation, for the Bannock Tribe. Second Treaty of Fort Bridger, art. 2.

the Reservation is located. The State sought this declaration of federal and Indian water rights in its own state courts in connection with an adjudication of all water rights in the Big Horn Basin. This proceeding was filed pursuant to a state statute—enacted two days before the action was filed—establishing a procedure for determining all rights to water in river systems within the state. 1977 Wyo. Sess. Laws Ch. 2, § 1, Wyo. Stat. § 1-37-106 (1977); Pet. App. 726a.

On the same day the proceeding was filed, the state district court ruled that the joinder of the United States in the state proceeding was proper under the McCarran Amendment, 43 U.S.C. § 666 (1982). The United States thereafter removed the proceeding to federal district court, but that court remanded the proceeding to state court, largely in light of this Court's ruling in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Pet. App. at 720a. Thereafter, the United States, supported by an amicus brief from the Tribes, moved to dismiss the state proceeding on the ground that the state court lacked jurisdiction to resolve the federal and Indian water rights. *Id.* at 11a-12a. The state district court denied the Government's motion to dismiss. *Id.* at 12a. The Tribes, having depended on the waters of the Big Horn Basin for more than a century, intervened in the state adjudication to protect their water rights under the Treaty.

Pursuant to the statute authorizing the general adjudication, the State moved to certify the proceeding to a state administrative agency, the Board of Control, to conduct the adjudication. *Id.* at 396a. The United States and the Tribes opposed this motion, arguing that the Board of Control had no special expertise to resolve the federal-law issues of reserved water rights because the water law of Wyoming, which the agency administers, is based on priority of historical, actual beneficial use of water ("prior appropriation"), whereas the federal law of reserved water rights is based on the implicit reservation of water by the

United States to accomplish the purposes of the federal enclave or Indian reservation, even if such water has not as yet been put to beneficial use.

The state district court denied the State's motion and, in May 1979, appointed a Special Master approved by all the parties. The Special Master divided the general adjudication into three phases. The first phase—the only phase at issue here—was a determination of Indian reserved water rights.

On December 15, 1982, after extensive pretrial discovery and a lengthy trial, the Special Master signed his Report and proposed Decree regarding the water rights reserved for the Tribes under the Treaty. Pet. App. at 367a.

The Rulings Below

The Special Master ruled that, when the United States established the Reservation pursuant to the Treaty in 1868, water rights were reserved on behalf of the Indians to satisfy the purpose of the Treaty. *Id.* at 432a. The Special Master further ruled that "the principal purpose for entering into this Treaty was to provide the Indians with a homeland where they could establish a permanent place to live and develop their civilization." *Id.* at 442a. In light of this purpose, the Special Master held that the amount of water reserved by the Treaty was that necessary for the development of the Reservation as a permanent homeland for the Indians. *Id.* This amount included that "necessary to provide for the Indians not only in their agricultural development, but also in the raising of livestock, the assurance that fish and wildlife will also be available for their use, the development of the minerals that may be found on the Reservation, the growth and provision for municipal and industrial civilization, and for protection and preservation of the aesthetic natural conditions found on the Reservation." *Id.*

On May 10, 1983, the state district court ruled on the parties' objections to the Special Master's Report. *Id.* at

202a. The court ruled, as a matter of law, that the purpose of establishing the Reservation was not, as the Special Master held, to provide a permanent homeland for the Tribes, but rather to convert the Indians into "an agrarian people whose livelihood would be earned by farming." *Id.* at 217a. Having concluded that "the sole purpose of the Reservation was agriculture," *id.* at 220a, the court reduced the total amount of reserved water quantified by the Special Master and awarded only the amount necessary to irrigate the Reservation lands found to be practically irrigable.

The district court rejected the Special Master's rulings on several other issues. Although the Special Master had granted the Tribes certain reserved rights to groundwater under the Treaty, *id.* at 607a-611a, the district court flatly rejected all claims for reserved rights to groundwater. *Id.* at 238a-243a. Indeed, the court held that "the State of Wyoming owns all groundwater, even that which flows beneath the reservation." *Id.* at 242a. In addition, with respect to the issue of exportation, the Special Master had held that the Tribes were permitted in certain circumstances to export reserved surface water off the Reservation for use by themselves or by others. *Id.* at 580a-582a. By contrast, the district court ruled that the Tribes' use of their reserved water "is confined to the reservation," *id.* at 269a, and that any leasing of the Tribes' reserved water rights "cannot be for exportation off of the reservation." *Id.*

Moreover, the district court affirmed the denial of reserved water rights for the irrigation needs of the Tribes for two future irrigation projects (Stagner Ridge and Big Horn Flats Extension) and for various tracts of currently or historically irrigated Reservation lands ("historic lands") without state water certificates. *Id.* at 246a-250a, 259a. Finally, in determining the amount of water reserved by reference to the Tribes' irrigation needs for the historic lands, the district court affirmed the use of an efficiency

rate for water use of 40 percent, whereas the average rate achieved by all irrigators in the region is only 35 percent. *Id.* at 250a; 508a-512a.

After the district court entered a final amended judgment and decree on May 24, 1985, *id.* at 168a, the parties appealed to the Supreme Court of Wyoming.

That court affirmed the district court's decision on the issues presented in this cross-petition. Contrary to the Special Master's finding that the Reservation was created to provide a permanent homeland for the Indians, the state supreme court concluded, by a vote of three to two, that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. In light of this conclusion, the state supreme court majority affirmed the district court's reduction of the amount of water reserved for the Tribes to that necessary only for the irrigation needs of the Reservation.[2] *Id.* at 32a-43a.

With respect to groundwater, the state supreme court, while acknowledging that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," *id.* at 44a, affirmed the district court's denial of a reserved right to groundwater. *Id.* at 44a-45a. With respect to exportation, the state supreme court declined to address the merits of the appeals by the Tribes and the United States of the district court's ruling that the Tribes were not permitted under the Treaty to export their reserved water. *Id.* at 45a. With respect to the burden of proof, the state supreme court affirmed the placement of the burden on the Tribes to establish their reserved water rights for the irrigation of certain Reservation lands, *id.* at 49a, 60a-62a,

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[2] The state supreme court held that there was "a reserved water right for municipal, domestic, and commercial use," Pet. App. at 43a, but that the amount of water reserved for such use, as well as that for livestock use, was subsumed in the amount necessary to irrigate the practicably irrigable acreage on the Reservation. *Id.* at 42a-43a.

the result of which was to deny the Tribes reserved water rights for the irrigation of 11,916 acres of historic lands and of 9,970 acres of land in the proposed Stagner Ridge and Big Horn Flats Extension projects. *Id.* at 58a-59a, 65a-68a. Finally, with respect to the water-use efficiency rate to be used in quantifying the Tribes' reserved water rights in connection with the historic lands, the state supreme court affirmed the district court's use of a rate substantially higher than the average rate for irrigation projects in the region. *Id.* at 68a-69a

Presentation of Federal Questions

The questions presented in this cross-petition, which involve the reserved water rights of the Shoshone and Northern Arapaho Tribes under the Second Treaty of Fort Bridger, are questions of federal law, *see, e.g., United States v. District Court in and for the County of Eagle*, 401 U.S. 520, 526 (1971), and were properly raised below.[3]

[3] In the proceedings below, the Tribes asserted that the amount of water reserved under the Treaty is that necessary for the development of the Reservation as a permanent homeland, including the agricultural and non-agricultural development of the Reservation. *See* Special Master's Report (Pet. App. at 441a); Opening Brief of Appellants Shoshone and Northern Arapaho Tribes (Type Two Issues) at 18-57 (Dec. 16, 1985) ("Tribes' Type Two Brief"). The Tribes also asserted reserved rights to groundwater. *See* Special Master's Report (Pet. App. at 602a); Tribes' Type Two Brief at 58-66. When the district court limited all uses of the Tribes' reserved water to the Reservation, Pet. App. at 222a, the Tribes requested the Supreme Court of Wyoming to overturn this ruling. *See* Tribes' Type Two Brief at 80-82. In addition, the Tribes asserted below that the Wyoming courts had erred in assigning to the Tribes the burden of establishing their reserved rights under the Treaty. Opening Brief of Appellants Shoshone and Northern Arapaho Tribes (Type One Issues) at 26-28 (Dec. 16, 1985) ("Tribes' Type One Brief"); *see also* Brief for the Appellant United States at 33-43 (Dec. 1985). Finally, with respect to the quantification of the reserved water right for the historic lands, the Tribes sought the use of a water-use efficiency rate equal to the rate actually achieved by irrigators in the region, Special Master's Report (Pet. App. at 509a-510a), and sought to have the use of the higher rate overturned. Tribes' Type One Brief at 54-55.

REASONS FOR GRANTING THE WRIT

This cross-petition presents substantial questions of federal law regarding the reserved water rights of the Shoshone and Northern Arapaho Tribes. The Tribes seek review by this Court of these questions in the event that the State of Wyoming's petition in *Wyoming v. United States*, No. 88-309, is granted.

The Wyoming state courts erroneously limited the reserved water rights of the Tribes under the Second Treaty of Fort Bridger, pursuant to which the United States established the Wind River Indian Reservation. Contrary to the provisions of the Treaty, the state courts concluded that the Reservation was created for a sole agricultural purpose and thereby improperly restricted the amount of water reserved under the Treaty to that necessary only for irrigation needs on the Reservation. Thus, even though the Treaty expressly provides that the Reservation was established as a "permanent home" for the Indians, the state courts allotted no water for any of the other uses necessary to develop a permanent homeland for the Indians on the Reservation.

The state courts also erred in failing to recognize any treaty rights of the Tribes with respect to groundwater, even the right to substitute the use of groundwater to satisfy the Tribes' reserved rights in circumstances where such use would not increase the Tribes' total water consumption. The state supreme court apparently left undisturbed the district court's erroneous ruling that, under the Treaty, the Tribes may not export their water off their land, a right enjoyed by every other water user in Wyoming. Contrary to the federal statute governing the burden of proof in disputes involving Indian property, the state courts erred in assigning the Tribes, after a *prima facie* case had been made, the burden of proof in establishing their reserved water rights for the irrigation needs of certain Reservation lands, the result of which was to deny

the Tribes reserved rights for the irrigation of more than 21,000 acres of the Reservation. Finally, in determining the amount of reserved water for the irrigation needs of the Tribes on the historic lands, the state courts erred in applying a water-use efficiency rate substantially higher than the average rate for irrigation projects in the region, the result of which was to reduce the total award of water for these lands by 12.5 percent.

The resolution by this Court of the questions presented here—involving Treaty purposes, groundwater, exportation, burden of proof, and efficiency—would be of great importance to the Shoshone and Northern Arapaho Tribes. But even more important to the Tribes would be a prompt end to this adjudication initiated by the State more than a decade ago. The Tribes desperately need to develop the economy on the Reservation, where the unemployment rate currently exceeds 70 percent, alcoholism and substance abuse are rampant, and the suicide rate is tragically high. During the past ten years, the efforts of the Tribes to develop the Reservation economy have been largely thwarted by this adjudication, for, until it is finally resolved, the Tribes cannot make meaningful decisions regarding how best to use their most valuable resource, water, for the benefit of their members. It would be a devastating blow to the Tribes if, as the State urges, this Court were to revise the well-established standards for quantifying Indian water rights for agricultural purposes based on practicably irrigable acreage and remit the Tribes to another decade of uncertainty in litigation. Accordingly, for these reasons and those stated in their Opposition Brief, the Tribes urge this Court not to review any of the rulings of the state courts.

But, in the event that the Court decides to review the questions presented by the State, the Court should also review the questions presented in this cross-petition, all of which were erroneously resolved against the Tribes and the United States by Wyoming's own state courts. The

Tribes and the United States objected to the jurisdiction of the Wyoming courts in this matter. But these objections were overruled in light of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-13 (1976), in which this Court held that the adjudication of Indian water rights, unlike all other rights possessed by Indian Tribes, should occur in state, not federal, court. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), this Court, recognizing that it had become the only federal forum available to Indian Tribes to protect these important treaty rights, accepted a special responsibility to review state-court rulings alleged to infringe on Indian reserved water rights:

> [A]ny state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

463 U.S. at 571. The Shoshone and Northern Arapaho Tribes look to this pledge in seeking review of the questions raised in this cross-petition in the event that the Court grants the State's petition.

I. The Supreme Court of Wyoming's Ruling that the Amount of Water Reserved Under the Treaty Is Limited to That Necessary Only for the Irrigation Needs of the Reservation Is Erroneous and Inconsistent with This Court's Decision in *United States v. Shoshone Tribe*.

The Supreme Court of Wyoming erroneously restricted the amount of water reserved under the Treaty to that necessary only to irrigate the practicably irrigable lands on the Reservation. The Supreme Court of Wyoming correctly held that "Congress intended to reserve water for the . . . Reservation when it was created in 1868, and . . .

the amount of water impliedly reserved is determined by the purposes for which the reservation was created." Pet. App. 33a. But the court erred in ruling, by a vote of 3 to 2, that the Reservation was created "with a sole agricultural purpose," *id.* at 38a, and thus in determining the amount of reserved water by reference only to the irrigation needs of the Reservation. *Id.* at 32a-43a.

The proper interpretation of the Treaty, as the Special Master ruled, is that the Reservation was created not solely for an agricultural purpose, but rather "to provide a permanent homeland for the Indians so that they may, in whatever way most suitable to their development, establish a permanent civilization on the Wind River Indian Reservation." Pet. App. at 441a-442a. Thus, as the Special Master held, the amount of water reserved under the Treaty is that necessary for the development of the Reservation as a permanent homeland. *Id.* at 442a. This amount includes that necessary not only for the agricultural development of the Reservation, such as for irrigated farming, but also for its non-agricultural development, such as for raising livestock, extracting minerals, ensuring adequate supplies of fish and wildlife, protecting the natural aesthetic condition of the Reservation, and for municipal, domestic, commercial, and industrial uses. *Id.*

The provisions of the Treaty reveal that the Reservation was created to provide a permanent homeland for the Indians. Under the Treaty, the United States agreed that the Reservation "shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians." Second Treaty of Fort Bridger, art. 2; Pet. App. at 795a. In return, the Indians agreed to make the Reservation their "permanent home." Art. 4; Pet. App. at 796a. The Indians further agreed to "relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within [the Reservation]." Art. 2; Pet. App. at 796a. The Treaty sought to "insure the civilization of the tribes

entering into this treaty" and obligated the United States to furnish schools and teachers. Art. 7; Pet. App. at 798a. The United States further agreed to provide the Indians with a physician, carpenter, miller, engineer, and blacksmith. Art. 10; Pet. App. at 800a. As the Special Master held, "the reasonable interpretation [of these provisions] can only lead one to conclude that the purpose of the Treaty was to provide a permanent homeland for the Indians." Pet. App. at 442a.

The contrary ruling of the Supreme Court of Wyoming rests on a cramped and erroneous reading of the Treaty that Justice Thomas, joined in dissent by District Judge Hanscum, rejected because "it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization." *Id.* at 83a. In finding a sole agricultural purpose for the Reservation, the court relied on the fact that the Treaty contains several provisions promoting agricultural development on the Reservation.[4] *Id.* at 39a. That the

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[4] In concluding that the Reservation had a sole agricultural purpose, the district court had seized upon the phrase "said agricultural reservations" in Article 7 of the Treaty. Pet. App. at 217a. Article 7 provides:

> In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations. . . .

Pet. App. at 798a. The district court concluded that this phrase "confirms the Reservation's singular, and hence primary, purpose as an agricultural reservation." Pet. App. at 217a.

In their briefs to the Supreme Court of Wyoming, the Tribes and the United States argued that, when read in context, the phrase "said agricultural reservations" referred not to the two Indian Reservations created or to be created by the Treaty (Wind River for the Shoshones and Fort Hall for the Bannocks), *see supra* note 1, but rather to the 320- and 80-acre tracts of land made available in Article 6 of the Treaty to individual Indians expressly for agricultural development. The State

Treaty contains these provisions shows only that agricultural development was an *important* objective in establishing the Reservation, not that agricultural development was the *only* objective. As even the state supreme court acknowledged, the Treaty "clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9)." *Id.* at 40a. Indeed, the court held that there was "a reserved water right for municipal, domestic, and commercial use," *id.* at 43a, but then declined to award an additional amount of reserved water for these uses.[5] *Id.* at 42a-43a. In short, the ruling that the Reservation was created for a sole agricultural purpose is simply incorrect.[6]

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of Wyoming argued that the phrase referred to the two Indian Reservations and thus revealed that the Treaty had a sole agricultural purpose.

The Supreme Court of Wyoming concluded that the phrase was susceptible of both meanings. Pet. App. at 39a. This conclusion means that—certainly from the vantage point of the Shoshones, who were unable to read, write, or speak English when the Treaty was negotiated—the phrase "said agricultural reservations" was at the very least ambiguous. It is well settled that "ambiguities occurring [in Indian treaties] will be resolved from the standpoint of the Indians." Winters v. United States, 207 U.S. 564, 576 (1908); *see also infra* authorities cited in note 9.

[5] The state supreme court held that the amount of water reserved for these uses was subsumed in the amount necessary to irrigate the practicably irrigable acreage on the Reservation. Pet. App. at 42a-43a. The Special Master had correctly awarded the Tribes an *additional* amount of reserved water for their municipal, domestic, commercial, and livestock needs. Pet. App. at 607a-608a. The Supreme Court of Wyoming's ruling that the Tribes are not entitled to an additional amount for these needs means that the Tribes will not even be able to irrigate all the practicably irrigable acres on the Reservation unless the Tribes forego using any of their reserved water for these other needs.

[6] The district court overturned the Special Master's findings of fact in support of the Tribes' claim for reserved water for various non-

The ruling below is also inconsistent with this Court's own interpretation of the Treaty in *United States v. Shoshone Tribe*, 304 U.S. 111 (1938). *Shoshone Tribe* involved a claim for compensation by the Shoshones against the United States based on the federal government's taking of a one-half interest in the Reservation when, in 1878, it permanently relocated the Northern Arapahos, ancestral foes of the Shoshones, on the Reservation. In defending against the claim, the United States argued that the Treaty provided the Shoshones only with the use and benefit of the surface of the land on the Reservation, nothing more. As a result, the Government asserted that the Tribe's claim was limited to the value of the surface estate and did not include the value of minerals or timber. *Id.* at 115. Essentially, the United States argued, as the Supreme Court of Wyoming ruled below, that the purpose of the Reservation was solely to turn the Indians into farmers.[7]

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agricultural uses. In so doing, the district court noted that these findings of the Special Master were "inapplicable . . . as a result of the Court taking a different position . . . on certain conclusions of law." Pet. App. at 209a. These contrary legal positions included the district court's rulings that: "(1) . . . the Tribes' reserved water rights, if they exist, are limited to that amount of water necessary to fulfill the primary purpose of the reservation which was agriculture. . . . [and] (2) To accomplish the purpose of the reservation, Congress did not reserve water for mineral development, municipal needs, industrial development, fisheries, wildlife nor protection of aesthetic natural conditions." *Id.* at 209a-210a. Thus, to the extent that the district court erred in its interpretation of the Treaty, it also erred in overturning the Special Master's factual findings, and both such rulings should be vacated. The same is true of the District Court's rulings regarding groundwater. *Id.* at 209a-210a, 238a-243a, 261a, 263a-264a, 268a-269a.

[7] As described by the Court of Claims, Shoshone Tribe v. United States, 85 Ct. Cl. 331, 360 (1937), the Government's position was that the only rights for which the Shoshones were entitled to compensation were "the rights to live upon the reservation, to use such materials thereon as might be necessary for building and farming purposes and for the purpose of carrying on farming operations thereon. . . ."

This Court flatly rejected the Government's argument, ruling instead that the Treaty granted the Tribe beneficial ownership of the timber and mineral resources within the Reservation. *United States v. Shoshone Tribe*, 304 U.S. 111, 116-118 (1938). In reaching this conclusion, the Court relied on the provisions of the Treaty setting apart the Reservation for "the absolute and undisturbed use and occupation" of the Shoshones and making the Reservation their "permanent home." *Id.* at 113, 116. These provisions were to be construed in accordance with the well-established rules of Indian treaty interpretation:

> [F]riendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

Id. at 116. Moreover, the Court noted that when the Shoshones entered into the Treaty, the Reservation was "known to contain valuable mineral deposits—gold, oil, coal and gypsum" and "included more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable," all located in "the choicest and best-watered portion of Wyoming." *Id.* at 114. In light of these considerations, the Court rejected the Government's arguments and held that:

> *The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the* [*Wind River Indian Reservation*]. To that end the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity.

Id. at 116 (emphasis added). In essence, this Court ruled

that the purpose of the Reservation was to establish a permanent homeland for the Indians.[8]

The ruling below is inconsistent not only with this Court's prior interpretation of the Treaty, but also with this Court's ruling in *Shoshone Tribe* that the terms of the Treaty are to be "construed in the sense in which naturally the Indians would understand them."[9] *Id.* at 116. There can be little doubt how the Shoshones "naturally . . . would [have] under[stood]" the Treaty. In 1868, when the Shoshones—then unable to read, write, or speak English—entered into the Treaty, the Tribe and the United States had long enjoyed friendly relations and were even military allies. In return for ceding their rights previously recognized by treaty to a tract of land larger than the State of Missouri, the Shoshones agreed to make their "permanent home" on the Reservation, which the United States agreed to "set apart for [their] absolute and undisturbed use and occupation." The Reservation was a much smaller tract of land than that ceded, but one that the Tribe had selected and that was known to contain valuable mineral resources, extensive timberlands, and fertile river valleys

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[8] This Court reached a similar conclusion with respect to the Miami Tribe in 1867, one year before the United States and the Shoshones signed the Second Treaty of Fort Bridger. The Kansas Indians, 72 U.S. (5 Wall.) 737, 760-761 (1867) ("The object of the Treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians.").

[9] This Court has consistently followed the rules of Indian treaty interpretation applied in *Shoshone Tribe*. *E.g.*, Choctaw Nation v. Oklahoma 397 U.S. 620, 631 (1970) ("this Court has often held that treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor") (citing Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.").

conveniently irrigable, and was located in the best-watered area in the region. In these circumstances, the Shoshones "naturally . . . would [have] under[stood]" that the Tribe would be entitled to use all water necessary to develop a permanent homeland on the Reservation.

In sum, the ruling below that the Reservation was created for a sole agricultural purpose is inconsistent with the provisions of the Treaty itself, this Court's interpretation of the Treaty in *Shoshone Tribe*, and the well-settled rules governing Indian treaty interpretation applied by this Court in *Shoshone Tribe*. The Supreme Court of Wyoming has abridged the water rights of the Tribes under the Treaty by erroneously restricting the amount of water reserved for the Tribes to that necessary only for the irrigation needs of the Reservation.

II. The Supreme Court of Wyoming Erred in Failing To Recognize the Rights of the Tribes Under the Treaty with Respect to Groundwater.

The Supreme Court of Wyoming failed to recognize the treaty rights of the Tribes with respect to groundwater. The Special Master held that the Tribes had a reserved right to groundwater from the Reservation's shallow aquifers for domestic, livestock, and commercial uses, Pet. App. at 607a-608a, and that the deeper aquifers on the Reservation were "the proper sources of water for said future industrial activities." *Id.* at 608a. But the district court denied altogether the Tribes' claim to a reserved right to groundwater, finding that "the State of Wyoming owns all groundwater, even that which flows beneath the reservation." *Id.* at 242a. The Supreme Court of Wyoming affirmed this ruling, holding that "[t]he district court did not err in deciding there was no reserved groundwater right." *Id.* at 45a.

The distinction drawn by the Supreme Court of Wyoming between surface water and groundwater is illusory. Most groundwater is directly related to some surface wa-

tercourse; either the watercourse feeds the aquifer or vice versa.[10] A stream, for example, is literally the surface flow of one integrated hydrologic resource that includes the underlying aquifer. As this Court has put it, "groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert v. United States*, 426 U.S. 128, 142 (1976). *See generally* National Water Commission, *Water Policies for the Future* 233 (1973). The fiction of maintaining separate surface-water and groundwater systems has increasingly been criticized because it results in the inefficient use of water, and because resource-management practices should comport with scientific realities. *See, e.g.*, Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27B Rocky Mtn. Min. L. Inst. 1853 (1982). The State of Wyoming has also recognized these hydrologic facts and requires conjunctive management of surface-water and groundwater supplies when the two are connected. Wyo. Stat. § 41-3-916 (1977).

The federal courts have consistently recognized the hydrologic relationship between surface flows and groundwater in decisions involving federal and Indian reserved water rights. In *Cappaert v. United States*, 426 U.S. 128, 138-143 (1976), this Court upheld an injunction prohibiting groundwater pumping from land near Devil's Hole, a national monument set apart to preserve a unique underground pool, to the extent that the groundwater pumping interfered with the federal reserved water right to maintain the level of the surface water in the underground pool. Moreover, the lower federal courts have repeatedly held that federal and Indian reserved rights extend not only to surface water, but also to groundwater.[11]

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[10] The Special Master recognized this interrelationship, noting that certain "shallow aquifers [on the Reservation] . . . depend directly upon the Wind River for their life." Pet. App. at 605a.

[11] United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974) ("the United States may reserve not only surface water, but also underground

In accordance with these federal decisions, the Tribes, supported by the United States, sought three rulings with respect to groundwater. The first of these requested rulings—that the State may not authorize groundwater pumping that would interfere with or impair the decreed treaty rights of the Tribes to reserved water from surface flows—follows directly from this Court's ruling in *Cappaert*. The second requested ruling—that the Tribes may satisfy their reserved rights out of groundwater rather than surface flows, subject to the limitation that such substitution would not increase the Tribes' consumptive use of water—would permit the Tribes the flexibility to draw some of their reserved water from wells rather than to divert all of their water from surface flows. Neither of these requested rulings would result in an additional award of water, and the State itself acknowledged that the Tribes were entitled to

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water"), *aff'd on other grounds*, 426 U.S. 128 (1976); Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958) (upholding the federal government's pumping of groundwater without a state-awarded permit), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960); Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968) ("The *Winters* case dealt only with surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference."); New Mexico ex rel. Reynolds v. Aamod, 618 F. Supp. 993, 1010 (D.N.M. 1985) ("The Pueblo water rights appurtenant to their lands are the surface waters of the stream systems and the groundwater physically interrelated to the surface water as an integral part of the hydrologic cycle. . . . The Pueblos have the prior right to the use of this water."). *See also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 45-47 (9th Cir.) (upholding the reserved right of the Indians to surface flows and groundwater), *cert. denied*, 454 U.S. 1092 (1981).

All of these cases were cited by the Tribes or the United States in their briefs to the Supreme Court of Wyoming. Brief of Appellant United States at 89-94 (Dec. 1985); Tribes' Type Two Brief at 60-66; Reply Brief of Appellants Shoshone and Northern Arapaho Tribes (Type Two Issues) at 49-51 (May 23, 1986).

these rulings.[12] Nonetheless, the Wyoming courts erroneously failed to incorporate either of these requested rulings in their decisions or the decree.

The Wyoming courts further erred in rejecting the third requested ruling regarding groundwater, pursuant to which the Tribes sought an additional amount of reserved water under the Treaty from groundwater sources for certain industrial, domestic, municipal, commercial, livestock and mineral development needs. The Supreme Court of Wyoming flatly rejected this claim for reserved groundwater for the sole reason that "not a single case applying the reserved water doctrine to groundwater is cited to us." Pet. App. at 44a. Such cases had in fact been cited below; *see supra* note 11. But, even if there had been no such precedent, the Supreme Court of Wyoming erred in denying the claim, for it readily conceded that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 44a. In short, the Supreme Court of

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[12] In its brief to the Supreme Court of Wyoming, the State noted that:

> At the conclusion of the groundwater portion of their brief, the Tribes ask that this Court require the District Court to include in its decree three provisions. Tribes' Appellant's (Type 2) Brief, p. 66. The State has no objection and has never taken a position contrary to either of the first two conditions:
>
> (i) that the State cannot authorize groundwater pumping that interferes with or impairs the Tribes' decreed rights to surface flows; (ii) that permits the Tribes to satisfy their reserved rights out of groundwater instead of surface water provided that such substitution would not adversely affect other water users. . . .

Brief of Appellee State of Wyoming In Response to the Appellants' Briefs of the United States and Tribes (Type 2 Claims) at 115. (Feb. 24, 1986) ("Wyoming's Type Two Brief").

Wyoming erred in concluding that there is no reserved right to groundwater under the Treaty.[13]

III. The Tribes Are Not Restricted Under the Treaty from Exporting Their Reserved Water off the Reservation For Use by Themselves or by Others.

The decision of the Supreme Court of Wyoming apparently leaves undisturbed the district court's erroneous ruling that the Tribes are restricted under the Treaty from exporting their reserved water off the Reservation. The Special Master held that the Tribes are permitted in certain circumstances to export their reserved surface water. Pet. App. at 582a. The district court, however, while recognizing that it could not "dictate to the Tribes how they must use water that comes under a reserved water right," nonetheless ruled that "the Court can restrict any use of said water to within the boundaries of the reservation," *id.* at 264a, and decreed that "the use [as well as the sale of reserved water] is confined to the reservation." *Id.* at 269a. The Tribes and the United States appealed the district court's ruling, but the Supreme Court of Wyoming declined to address the merits of these appeals.[14]

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[13] The reserved rights of the Tribes under the Treaty to groundwater extend not only to the shallow aquifers that are hydrologically related to surface flows, but also to the deep aquifers that are not so related. The reserved rights of the Tribes to this deep groundwater are akin to their mineral rights under the Treaty. *See* United States v. Shoshone Tribe, 304 U.S. 111 (1938).

There is no merit to the ruling of the district court that the Tribes have no reserved rights to groundwater under the Treaty because "the State of Wyoming owns all groundwater, even that which flows beneath the reservation." Pet. App. at 242a. This Court has rightly termed state ownership of water a "legal fiction." Sporhase v. Nebraska ex. rel. Douglas, 458 U.S. 941, 951 (1982).

[14] The Supreme Court of Wyoming's entire discussion of the groundwater issue is as follows:

> The district court held that '[t]he Tribes can sell or lease any

The district court erred in interpreting the Treaty to restrict the Tribes from exporting their reserved water off the Reservation. There is no case support whatsoever for this ruling, and it conflicts with the general rule that Indian tribes are entitled to lease, encumber and alienate their property, subject to federal supervision.[15] Just as this

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> part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation.' The Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation. Because of our holding on the groundwater issue, we need not address the separate constitutional attack on the prohibition of exportation of groundwater.

Pet. App. at 45a. The court's observation that the Tribes did not seek permission to export reserved water is incorrect; both the Tribes and the United States repeatedly asserted that the Tribes are not restricted under the Treaty from exporting reserved water off the Reservation for use themselves or by others. *E.g.*, Decision of the District Court, May 10, 1983 (Pet. App. at 222a); Tribes' Type Two Brief at 80-82; Brief for the Appellant United States at 103-105 (Dec. 1985).

Moreover, the court's observation regarding the "concession" by the United States refers not to the treaty question properly presented in this proceeding—whether the Tribes are restricted under the Treaty from exporting their reserved water off the Reservation for use by themselves or by others—but rather to a statutory question not presented here: whether, under the federal statutes regulating the sale and leasing of Indian trust assets, Congress has presently authorized the Tribes to export reserved water off the Reservation for sale or leasing. This statutory question was not litigated in the Wyoming courts, and indeed the Wyoming courts lacked jurisdiction under the McCarran Amendment, 43 U.S.C. § 666, to resolve that federal statutory question, because, under the McCarran Amendment, the United States did not waive its sovereign immunity with respect to that question.

In view of the state supreme court's apparent belief that no exportation issue was in the case, it may be open to the Tribes to argue to the district court on remand that its holding on the point should be vacated.

[15] Transfers of Indian property interests have always been subject to federal supervision. In 1790, the first Congress adopted the Non-In-

Court in *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938), construed the Treaty as implicitly reserving for the Tribes the mineral resources on the Reservation—the rights to which the Tribes have since leased to third parties—so, too, should the Treaty be interpreted to afford the Tribes the right to export their water resources reserved under the Treaty for use off the Reservation by others. *See generally* Comment, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 Calif. L. Rev. 179, 199-200 (1988) ("Off-reservation leases of Indian water rights further . . . congressional policies and thus are a use consistent with the purposes of the reservation.").

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tercourse Act, 25 U.S.C. § 177 (1982), requiring congressional approval of any transfers of Indian land. Since then, Congress has continued to occupy the field of Indian land transactions by maintaining a comprehensive statutory scheme on the subject. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). In addition, Congress has adopted omnibus legislation authorizing the leasing of various tribal resources, such as the leasing of mineral rights. *See generally* F. Cohen, Handbook of Federal Indian Law, ch. 9 (1982). Indeed, Congress has specifically approved the transfer of Indian water rights in connection with the Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, § 306(c) & (d), 96 Stat. 1280 (affording Papago Tribe the right to use water "within or outside the Papago Reservation" and to "sell, exchange or temporarily dispose of water, but the tribe may not permanently alienate any water right."). Congress is also now actively considering several bills concerning Indian water transfers. *See, e.g.*, Ute Indian Water Settlement Act of 1988, H.R. 5029, 100th Cong. 2d Sess. § 7 (Water provided under the settlement may be devoted to all types of uses, including "municipal, industrial, recreational, in-stream uses, sale, lease, or any other use whatsoever. . . ."); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, S. 2153, 100th Cong. 2d Sess. § 8 (providing that the community "shall lease" up to 13,300 acre feet to the City of Phoenix, but limiting other leases or transfers of water). In short, interests in Indian land and other natural resources are inherently transferable, subject to federal supervision.

Transfers of water play a central role in ensuring the efficient use of this scarce resource in the American West. A smoothly operating market system assures that water can be moved from outmoded uses to new, more cost-effective ones. *See, e.g.*, Western Governors' Association, *Western Water: Tuning the System* (1986); Getches, *Water Use Efficiency: The Value of Water in the West*, 8 Public Land L. Rev. 1, 17-23 (1987). The western water market is expanding rapidly, and this Court has facilitated these developments by recognizing that "water is an article of commerce. . . ." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

Wyoming has recognized the importance of water transfers, and such transfers are expressly permitted under Wyoming law. Wyo. Stat. §§ 41-3-103, 104. Indeed, the Tribes are not seeking any greater right to transfer water than that enjoyed by all other water users in the State.[16] The rigid limitations imposed by the district court would disadvantage the Indians who, like their fellow citizens in Wyoming, should as a matter of fairness be in a position to maximize the development potential from their re-

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[16] The State conceded below that it "would not be discomfited if this Court were to hold that the Tribes may obtain changes in use or places of use of reserved water rights [in accordance with the provisions of Wyoming law]." Wyoming's Type Two Brief at 159.

The Tribes acknowledge that, as a matter of fairness, transfers of water should be consistent with restrictions similar to those imposed by state law. *See* Tribes' Type Two Brief at 81. This is a recognition of the fact that other water users may depend on the return flow from tribal water uses; thus transfers can only include an amount equal to the beneficial consumptive use, not the total amount diverted. *See, e.g.*, Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954). In the context of Indian reserved rights not previously used, this means that the Tribes' entitlement to export water should be limited only if such exportation would cause other water users to be "worse off than they would have been if the rights had been exercised for their original use at the original place." *See* F. Cohen, Handbook of Indian Law 592 (1982 ed.).

sources. The district court's ruling would also negatively affect the economy in the region, for the ruling precludes the transfer of water to its most efficient use.

In the absence of an explicit limitation on the use of water in the Treaty itself, the Treaty should be construed to permit the Tribes to export their reserved water off the Reservation for use by themselves or by others, subject to federal supervision. Permitting such transfers not only would ensure that a scarce resource is put to its best use, but also would provide the Tribes with a source of critically needed funds to hasten the economic development of the Reservation.

IV. The Wyoming Courts Improperly Assigned the Tribes the Burden of Proof in Establishing Their Reserved Water Rights for the Irrigation Needs of Two Proposed Irrigation Projects and of Historic Lands Without State Water Certificates.

The Wyoming courts placed the burden of proof on the Tribes in establishing a reserved water right for historic lands without state water certificates, Pet. App. 60a-61a,[17] and for lands not previously irrigated but asserted to be practically irrigable ("future lands"). *Id.* at 49a. As a result, the Tribes were denied reserved water rights for 11,916 acres of historic lands,[18] and also for 9,970 acres of future lands (the proposed Stagner Ridge and Big Horn Flats Extension projects) that were conceded to be arable and practically irrigable from an engineering standpoint.[19]

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[17] In contrast, lands subject to uncancelled state water certificates were correctly presumed to be practically irrigable, Pet. App. 60a-61a. with the burden placed on the State to show the contrary.

[18] *See* Pet. App. at 65a (6,298 acres), 67a (1,675 acres), 68a (3,943 acres). The last category includes some Indian fee lands which have not been irrigated but which the Tribes demonstrated are substantially similar to lands that have been irrigated.

[19] *See* Pet. App. at 58a-59a, 585a.

The assignment of the burden of proof to the Tribes with respect to these lands was reversible error. The Act of June 30, 1834, Ch. 161 § 22, 4 Stat. 733, as codified at 25 U.S.C. § 194 (1982), provides:

> In all cases about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

In *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979), this Court noted that "[s]ection 194 is triggered once the tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute." *Id.* at 668 (emphasis in original).[20]

This case presents the novel question of how the Section 194 presumption applies to property consisting of water rights. A *prima facie* case would seem to require the following: (1) a showing that the land (the "area") is owned by the Tribes, and (2) a showing that the land for which water is claimed either (a) currently is or historically has been irrigated or (b) is arable and practically irrigable from an engineering standpoint.

As already noted, the Tribes concededly made those showings; yet more was demanded of them because of the

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[20] In *Wilson*, the Court held that Section 194 does not operate against a sovereign state involved in litigating title to property "to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America." *Id.* at 668. The present case does not involve those circumstances. First, the non-Indian claimants to property rights in the water of the Big Horn system are individual water users; the State of Wyoming claimed no interest in the water for itself. Second, with respect to the Tribes' claim for water for the two proposed irrigation projects on future lands, the Tribes were not litigating with the help of the United States, which did not support the Tribes in that claim.

state courts' incorrect assignment of the burden of proof. The state courts held that the Tribes had not sustained the burden of proving that the lands were irrigable from an economic point of view. They should have held, instead, that the State had the burden both of introducing evidence that the lands are not irrigable because of economic factors and of sustaining a burden of persuasion to that effect by a preponderance of the evidence. *Wilson*, *supra*, 442 U.S. at 669.

V. The Wyoming Courts Erred in Computing the Quantity of Water Reserved for the Tribes' Irrigation Needs on the Historic Lands by Using a Water-Use Efficiency Rate Higher than the Average Rate Achieved by Irrigators in the Region.

The Supreme Court of Wyoming erred with respect to the water-use efficiency rate to be used in quantifying the water reserved under the Treaty for the irrigation needs of the Tribes on the historic lands.[21] The Supreme Court of Wyoming erroneously used a water-use efficiency rate of 40 percent, whereas the average rate achieved by all irrigators in the region is only 35 percent. Pet. App. at 68a-69a. The result of this ruling was to reduce the total award of water to the Tribes for these lands by 12.5 percent.

The Wyoming courts sought to justify this use of a higher efficiency rate as a means of encouraging water conservation on the historic lands. Laudable as that objective may be, the practical effect of the ruling is to discriminate against the Indians by quantifying only their water rights under a higher efficiency rate, a rate that the Indians can meet only through expensive modifications

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[21] The water-use efficiency rate used in quantifying a reserved water right has a direct, inverse relationship to the total amount of an award, because the more efficient the use of water for irrigation or any other use, the less total water needs to be diverted.

of existing irrigation facilities (including irrigation canals shared by non-Indian irrigators on the Reservation). In justifying this disparity, the state supreme court noted that the Special Master "had no power to order an efficiency increase for non-Indian users." *Id.* at 69a. Thus, in the context of a general stream adjudication of the rights of all water users in the Big Horn Basin, the Wyoming state courts have quantified only the Indian water rights by reference to a higher efficiency rate than the average now achieved by all irrigators in the region.

The Wyoming courts erred in reducing the total award of water by quantifying the reserved right of the Tribes for the irrigation needs of the historic lands by using the 40 percent efficiency rate. The proper efficiency rate in this context should be no higher that that achieved by similarly situated water users. The disparate burden imposed by the Wyoming courts on the federal treaty rights of the Tribes is both unfair and incorrect.

VI. The Priority Date for Reservation Lands Owned by Non-Indians Should Be No Earlier than That for Reservation Lands Reacquired by the Tribes from Non-Indians.

The Tribes present a final issue simply as a matter of fairness. The State has raised the question of the appropriate priority date to be accorded a reserved water right for practicably irrigable Reservation lands reacquired by the Tribes from non-Indians. Pet. at 28-29. The State has apparently raised this question only as it applies to lands that have been reacquired from non-Indians by the Tribes, without raising the question of the appropriate priority date for lands that remain in non-Indian ownership and for which reserved rights have been claimed. In the proceedings below, the State opposed the reserved-water-right claims of such non-Indians, *see* Pet. at 9, but here the State seems to have addressed its challenge only against the Tribes. Surely, in this context, the non-Indians—who

are direct competitors with the Indians for water on the Reservation—should have no earlier priority date or more favorable treatment in determining that date than the Indians on whose behalf the water rights were reserved pursuant to the Treaty. Accordingly, in the event that the Court decides to hear this issue, it should address the question as it pertains to both Indians and non-Indians.

CONCLUSION

In the event that the petition of the State of Wyoming in *Wyoming v. United States*, No. 88-309, is granted, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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